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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1220

MAT CUMIC,

Petitioner,

vs.

WAYNE HAROLD KNOTT, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA AFTER DENIAL OF PETITION FOR HEARING BY CALIFORNIA SUPREME COURT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1969

In the Matter of

MAT CUMIC,

Petitioner,

vs.

WAYNE HAROLD KNOTT, et al.,

Respondents.

Petitioner, MAT CUMIC, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeal of the State of California, Second Appellate District, Division 4, filed July 14, 1969 (Order Modifying Opinion and Denying Rehearing filed July 30, 1969).

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division 4, is unreported and is set forth in Appendix A hereto. The "Order Modifying the Opinion and Denying Rehearing" in said Court of Appeal is also unreported and is set forth in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeal of the State of California, Second Appellate District, Division 4 was filed on July 14, 1969 (App. A). The Order Modifying the Opinion and Denying Rehearing was filed in said Court on July 30, 1969 (App. B). Petition for Hearing in the Supreme Court was denied on September 24, 1969. (See Certified Record).

This Honorable Court on petitioner's timely motion extended the time within which to file the within Petition for Writ of Certiorari until to and including February 23, 1970. The jurisdiction of this Court rests on 28 U.S.C. 1257 (3) and Rule 19-1-(a).

QUESTIONS PRESENTED

I. Whether the due process clause of the Fourteenth Amendment to the United States Constitution protects the right of a civil litigant to appeal and to have legal counsel on appeal to the extent that an Appellate Court is forbidden to fine appellant's counsel, who, in good faith, but unsuccessfully, attempts to establish an exception to an appellate, non-jurisdictional rule of procedure?

II. Whether the due process clause of the Fourteenth Amendment to the United States Constitution prevents a state from abrogating a right of appeal on the merits, otherwise given, on the ground of failure to comply with a condition precedent when the failure is not the fault of the appellant, but of appellant's trial counsel, acting in deliberate concert with the respondent in order to protect said trial counsel's fee. A subsidiary, theoretical question is whether due process compels a state to be concerned with the traditional duty of an attorney to forward the wishes of his client, even at the risk of financial injury to himself?

STATEMENT

Petitioner recovered a judgment against the respondent in a personal injury suit. (App. A, p. 1, l. 9; p. 2, l. 2). Instead of acceding to petitioner's wish to attack the judgment on the ground of the inadequacy of the award (App. A, p. 2, l. 11-14), petitioner's trial counsel made an unholy agreement with respondent's attorney that the judgment would not be attacked by motion for new trial, appeal, or otherwise, thus protecting trial counsel's contingent fee. (Certified Record,

Motion to Dismiss Appeal, Exhibit B contained therein - p. 1, l. 21; p. 2, l. 10)[1].

Petitioner's attorney then obtained a court order setting his fee and making it payable out of the judgment; this was possible under a quirk of California law because of the interests of a workmen's compensation lien claimant (App. A, p. 2, l. 2-5; Certified Record, Notice of Motion to Dismiss Appeal, p. 3, l. 13-18).[2] There was no notice to petitioner of the hearing concerning said court order, and accordingly, petitioner did not appear at said hearing. (Certified Record, Motion to Dismiss Appeal, p. 12, l. 7-12)[3]. As a matter of fact, petitioner's understanding of the English language was so imperfect that it was necessary that an interpreter be employed for his testimony during the trial. (Certified Record, Reporter's Transcript, p. 16, l. 17-18; p. 18, l. 17-24; p. 21, l. 1-13).

---

[1] This is a Notice of Motion to Dismiss the appeal by petitioner's said trial attorney; Exhibit B is a declaration by petitioner's trial attorney, which declaration is incorporated by reference in said notice of motion; said declaration was originally made in opposition to a post-judgment motion on behalf of petitioner to substitute said trial attorney out of the case.

[2] The statute in question is found in the California Labor Code, Section 3856(b), which reads as follows:

> "If the action is prosecuted by the employee alone, the court shall first order paid from any judgment for damages recovered the reasonable litigation expenses incurred in preparation and prosecution of such action, together with a reasonable attorney's fee which shall be based solely upon the services rendered by the employee's attorney in effecting recovery both for the benefit of the employee and the employer. After the payment of such expenses and attorney's fee the court shall, on application of the employer, allow as a first lien against the amount of such judgment for damages, the amount of the employer's expenditure for compensation together with any amounts to which he may be entitled as special damages under Section 3852."

[3] This was a motion, including supporting documents, filed in the said Court of Appeal, by petitioner's trial counsel to dismiss an appeal by petitioner from an order refusing to vacate said order for attorney's fees. The reference is to a declaration of petitioner's trial counsel in support of said motion.

Petitioner obtained another attorney to prosecute the appeal from the judgment (App. A. p. 2, l. 14-15). Under California appellate practice, it is a general non-statutory rule that a condition precedent to an appeal on the ground of inadequacy of award in a judgment is that a motion for new trial be made at the trial court level. (App. A, p. 3, l. 1-15).

On appeal, petitioner's appellate attorney contended that since the aforementioned appellate rule was non-statutory, and hence non-jurisdictional, exceptions could and should be made in the interests of justice; that in the instant case, the failure to make the motion for new trial was not the fault of petitioner but the result of an unholy alliance between petitioner's trial attorney, acting in his own interest and not that of petitioner, and respondent; and that therefore, it was in the interests of justice that an exception be made and that petitioner's claim of inadequacy of damages should be heard on its merits. (Certified Record, Appellant's Opening Brief on Appeal, p. 10, l. 12; p. 14, l. 23).

The Court of Appeals expressly refusing to pass upon either the bona fides of the trial attorney or the merits of the claim of inadequacy of damages, affirmed the trial court's judgment on the ground that the exception urged was without merit. (App. A, p. 3, l. 11; p. 4, l. 4).

Furthermore, without making a finding of fraud or dilatory tactics on the part of petitioner's appellate attorney, the Court of Appeals ordered petitioner's appellate attorney to pay respondent attorney's fees on the appeal on the ground that, "If counsel desires to engage in a futile effort to make new law under such circumstances, he does so at his own risk and not at the expense of an innocent respondent." (App. B, p. 1, l. 2, p. 2, l. 5).

REASONS FOR GRANTING THE WRIT

1. While due process does not require the states to establish avenues of appellate review, once established, these avenues must not be clogged by unreasoned state action in keeping open and equal access to the appellate courts. (*Griffin v. Illinois*, 351 U.S. 12; *Douglas v. California*,

372 U.S. 353; *Lane v. Brown*, 372 U.S. 477; *Draper v. Washington*, 372 U.S. 487; *Rinaldi v. Yeager*, 384 U.S. 305.

It follows that an appellant cannot be penalized for taking an appeal. As succinctly stated in *Worcester v. Commissioner*, 370 F. 2d 713, 718: "A court is. . .without right to. . .put a price on an appeal. . ."

This principle has been recently applied in a wide variety of criminal situations, (e.g. *North Carolina v. Pearce*, _____ U.S. _____, 89 Sup. Ct. _____, 23 L. Ed. 2d 656; *U.S. v. Jackson*, 390 U.S. 570; *Griffin v. California*, 380 U.S. 609; *Johnson v. Avery*, 393 U.S. 483).

This Court has also indicated in several civil cases that penalties imposed on a party for the privilege of appeal to the courts, deterring him from a vindication of his rights, are invalid under the due process clause of the Fourteenth Amendment to the United States Constitution. (*Missouri P.R. Co. vs. Tucker*, 230 U.S. 340; *Chicago, etc. R. Co. vs. Nye, Schneider Fowler Co.*, 260 U.S. 350.)

In the case at hand, the Court of Appeals of the State of California, fined petitioner's attorney for being wrong within the judgment of said Court of Appeal.[4]

[4] Under California Law (California Code of Civil Procedure, Section 957), an appellate court has a power to penalize the appellant or his attorney for a "frivolous" appeal. A "Frivolous appeal" is defined to be an appeal taken solely for the purposes of fraud or delay both in the statute and under case law. (*Estate of Walters*, 99 Cal. App. 2d 552, 558, 220 P. 2d 100, 104.)

California Code of Civil Procedure Section 957, reads:

"§957. Powers of court; restitution on reversal; right of action by appellant; damages where appeal made for delay.

When the judgment or order is reversed or modified, the appellate Court may make complete restitution of all property and rights lost by the erroneous judgment or order, so far as such restitution is consistent with protection of a purchaser of property at a sale ordered by the judgment, or had under process issued upon the judgment, on the appeal from which the proceedings were not stayed; and for relief in such cases the appellant may have his action against the respondent enforcing the judgment for the proceeds of the sale of the property, after deducting therefrom the expenses of the sale. When it appears to the Appellate

Clearly, every time that an exception is looked for in a general principle of law, there is an effort to make new law. This is the manner in which the common law traditionally grows. To fine the appellant's attorney because his effort to make new law was futile is for the state to take away on the one hand what has been given by the other hand, i.e., on the one hand, a right of method of appeal is established; on the other hand, the appellant is, or what amounts to the same thing - the appellant's attorney - is fined for using the avenue of appeal just because he happens to be unsuccessful. This is clearly unreasonable and contrary to our tradiitons that law is a living thing, capable of growth and change. It is therefore urged that it is a violation of due process to punish an appellant's attorney for being unsuccessful in his effort on appeal.[5]

2. The California Court denied petitioner a right to an appeal on the merits of his claim that the judgment for damages in his favor was inadequate on the ground that he had not made a motion for a new trial on that ground in the lower court.

As indicated by the principles discussed above, it appears basic that when a right is given by a state legislature even though it is not a right protected by the Federal Constitution, the arbitrary denial of that right violates the Fourteenth Amendment to the United States Constitution (e.g. U.S. ex. rel. *Siegal v. Follette*, D.C. N.Y. (1968) 290 F. Supp. 632).

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[4] cont.

> Court that the appeal was made for delay, it may add to the costs such damages as may be just. (Enacted 1872. As Amended Code AM. 1873-74, c. 383, p. 340, § 131.)

Petitioner has no quarrel with this concept and statute. However, in the case at hand, the Court of Appeal made no finding that petitioner's attorney had undertaken the appeal for the purpose of fraud or delay (App. A; App. B).

[5] This constitutional issue was first raised in the Petition for Hearing in the California Supreme Court, since petitioner had no way of knowing in advance that the appeal would be deemed frivolous by the California Court of Appeal.

In the case at hand, petitioner did not make a motion for a new trial because he had no realistic opportunity to do so.

His trial attorney refused to accede to petitioner's wish to attack the judgment on the ground indicated, and in stead, made an unholy agreement with the respondent's attorney that the judgment would not be attacked by motion for new trail, appeal, or otherwise. It becomes plain that this action was taken by petitioner's trial attorney in order to protect said trial attorney's interest in the judgment irrespective of the interests of the petitioner when consideration is given to the fact that petitioner's said trial attorney then obtained a court order setting his fee and making it payable out of the judgment. The unjustice was compounded by the fact that (1) petitioner's command of the English language was imperfect, i.e. as shown by the fact that he needed an interpreter at the trial; and (2) petitioner was not notified of the application for attorney's fees, nor was he given notice of the hearing thereon, nor was he present at the hearing.)

Therefore, the question arises whether the California state action in refusing to consider the merits of the appeal was so arbitrary as to violate due process.

The answer to this question, clearly depends upon whether or not due process compels the state to be concerned with the traditional duty of an attorney to forward the wishes of his client, even at the risk of financial injury to himself. If indeed due process has this effect, it would clearly be arbitrary within the rule above indicated for the State of California to deprive appellant of his right to an appeal on the merits.

In *Palko v. Connecticut*, 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288, the test laid down as to the protection of a given right of interests is whether or not such protection is basic in a free society, and is "of the very essence of a scheme of ordered liberty" so that to abolish it or to infringe it would be to violate a "principle of justice so ordered in the traditions and conscience of our people as to be ranked as fundamental." Compare: *U.S. v. Texas*, D.C. Tex. 1966, 252 F. Supp. 234, affirmed 384 U.S. 155, 86 S. Ct. 1383, 16 L. Ed. 2d 434.

It appears self-evident that the notion that an attorney must protect his client, even at the risk of injury to himself,

is a part of the tradition and collective conscience of our nation, whose laws are so deeply rooted in the common law of England.

For example, in *Weiderkind v. Tullumne County Water Company*, 74 Cal. 386, 19 P. 173, the California Supreme Court quoted Lord Eldon as stating that the attorney must make it manifest that he gave to his client "all that reasonable advice against himself that he would have given him against a third person."

Petitioner therefore urges that (1) due process necessarily compels the state courts to take cognizance of the traditional duty of the attorney to his client, (2) the failure of petitioner to perform the condition precedent ordinarily necessary for the type of appeal that he brought, was due to the disloyalty of his trial attorney, and (3) that accordingly, it was arbitrary and therefore a violation of due process for the Court of Appeal to deny him an appeal on the merits when performance of the condition precedent was not his fault but the result of the unholy alliance between his attorney and the respondent's attorney.

The Honorable Court has protected criminal defendants without counsel; petitioner asks that this court, by invoking the Due Process Clause of the Fourteenth Amendment, protect petitioner from his trial counsel's intentional acts adverse to petitioner.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

I. A. KANAREK
Attorney for Petitioner

APPENDIX A

(Certified for nonpublication)

IN THE DISTRICT COURT OF APPEAL

SECOND APPELLATE DISTRICT

State of California

DIVISION FOUR

MAT CUMIC,

Plaintiff and
Appellant,

vs.

WAYNE HAROLD KNOTT,

Defendant and
Respondent.

Civ. No. 32834

APPEAL from a judgment of the Superior Court, Los Angeles County. Joseph A. Wapner, Judge. Affirmed.

Judgment for plaintiff for an allegedly inadequate amount in a personal injury action, affirmed.

I. A. Kanarek and Sheldon Berlin, for Plaintiff and Appellant.

Spray, Gould & Bowers, Bob T. Hight, and Henry F. Walker, for Defendant and Respondent.

Plaintiff was injured in an automobile accident. He sued and, after a trial by jury, recovered judgment in the amount of $9,400 and costs. On motion of his trial counsel, the court awarded the attorney a fee, pursuant to his contingent fee retainer contract, in the amount of $4,138.85. Pursuant to a

motion made under subdivision (b) of section 3856 of the Labor Code, the court allowed a lien on behalf of the workmen's compensation insurance carrier of plaintiff's employer in the amount of $3,933.74. After these deductions, plaintiff received (including reimbursement for costs) the sum of $1,760.81.[1] No motion for a new trial was made.

Aggrieved at the small amount remaining for him, plaintiff discharged his trial counsel and, through new counsel, has appealed from the judgment. The sole error urged on us is the inadequacy of the damages awarded.

As the plaintiff's present counsel admits, a long and unbroken line of cases have held that the issue of inadequacy (or excessiveness) of damages cannot be raised on appeal unless that issue was first tendered to the trial court by a motion for new trial on that ground (Consult 3 Witkin, California Procedure (1954) Appeal, § 94, p. 2135, and cases cited.) Counsel urges on us that, since the rule is not statutory, we should exercise a discretion to consider his contention in order to avoid what he regards as a manifest injustice.

We see no reason to depart from the well settled and long established rule of review. The reasons for it in the cases are sound and the rule accords with a basic principle of judicial administration -- namely to secure correction of error at the trial court level if possible. Since we adhere to the rule above stated, we need not, and do not, pass on either: (1) the question of whether the decision of trial counsel not to move for a new trial was based on his legitimate determination that it would be unwise[2] or (as present counsel contends) on a

---

[1] As respondent points out, plaintiff has, of course, also received the benefit of the medical expenses and workmen's compensation award paid by the insurance carrier and over $300 costs advanced by his trial attorney, making his total recovery on account of the accident in the neighborhood of $6,000.00

[2] As counsel admits, the evidence on liability was such that if a new trial had been granted on all issues, a verdict for defendant was not unforeseeable. The argument made to us is that the amount of the verdict evidences a compromise verdict. If that argument had been made and had prevailed in the trial court, any new trial would necessarily have been on all issues.

desire to insure the fee awarded to him by the trial court; or (2) the question of whether or not, under the evidence, the verdict and judgment were, in fact, inadequate.[3/]

The appeal is patently frivolous. If counsel desires to bring about a reversal of settled law, he should not do so at the expense of the respondent. We think that counsel, and not respondent, should pay the costs of what, at the best, is an unsuccessful test lawsuit.

The judgment is affirmed. In addition to the usual costs on appeal, plaintiff's counsel shall pay, personally, to respondent, as a penalty for a frivolous appeal, the sum of $500, which sum we find to be a reasonable contribution by him toward respondent's expenses in defending the appeal.

KINGSLEY, J.

We concur:

JEFFERSON, Acting P. J.

DUNN, J.

Certified for nonpublication in the Official Reports pursuant to Rule 976.

JEFFERSON, Acting P. J.

KINGSLEY, J.

DUNN, J.

[3/] We have given above the computation that shows that plaintiff had received, from all sources, at least $6,000. The evidence, in addition to showing a disputable case of liability, also shows a prior injury which the jury might well have regarded as substantially affecting the medical condition shown at the time of trial and therefore as substantially affecting the damages assessable against defendant.

APPENDIX B

(Certified for nonpublication)

IN THE DISTRICT COURT OF APPEAL

SECOND APPELLATE DISTRICT

State of California

DIVISION FOUR

MAT CUMIC,

Plaintiff and
Appellant,

vs.

WAYNE HAROLD KNOTT,

Defendant and
Respondent.

Civ. No. 32834

ORDER MODIFYING OPINION AND DENYING REHEARING

THE COURT:

(1) The opinion heretofore filed in the above entitled matter is modified by deleting lines five through ten on page 4 of the typewritten opinion and substituting the following language in place thereof.

> The appeal is patently frivolous. The matters of which appellant complains are not the fault of respondent, nor of the trial court. If appellant was wronged at all (a matter which could not be determined on this record) his remedy is against his former attorney and not against respondent. If counsel desires to engage in a futile effort to make new law under such circumstances, he does so at his own risk and not at the expense of an innocent respondent. We think that counsel, and not respondent, should pay the expenses of such an action.

(2) The petition for a rehearing is denied.

IN THE DISTRICT COURT OF APPEAL

SECOND APPELLATE DISTRICT

State of California

DIVISION FOUR

MAT CUMIC,

Plaintiff and
Appellant,

vs.

WAYNE HAROLD KNOTT,

Defendant and
Respondent.

Civ. No. 32834

ORDER MODIFYING OPINION AND DENYING REHEARING

THE COURT:

(1) The opinion heretofore filed in the above entitled matter is modified by deleting lines five through ten on page 4 of the typewritten opinion and substituting the following language in place thereof.

> The appeal is patently frivolous. The matters of which appellant complains are not the fault of respondent, nor of the trial court. If appellant was wronged at all (a matter which could not be determined on this record) his remedy is against his former attorney and not against respondent. If counsel desires to engage in a futile effort to make new law under such circumstances, he does so at his own risk and not at the expense of an innocent respondent. We think that counsel, and not respondent, should pay the expenses of such an action.

(2) The petition for a rehearing is denied.

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October Term, 1969
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MAT CUMIC,

Petitioner,

vs.

WAYNE HAROLD KNOTT,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Four.

BRIEF FOR RESPONDENT KNOTT IN OPPOSITION.

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IN THE

Supreme Court of the United States

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MAT CUMIC,

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WAYNE HAROLD KNOTT,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Four.

BRIEF FOR RESPONDENT KNOTT IN OPPOSITION.

Opinions Below.

The opinion of the California Court of Appeal, filed July 14, 1969, appears as Appendix A to the Petition. It is an unreported opinion. Petitioner petitioned the California Court of Appeal for rehearing. On July 30, 1969, the California Court of Appeal filed its "Order Modifying the Opinion and Denying Rehearing". This also is unreported. It appears as Appendix B to the Petition.

By the order of July 30th, the California Court of Appeal struck the next to the last paragraph from the

opinion as originally filed[1] and, as finally rendered, the last two paragraphs of that court's opinion state:

> "The appeal is patently frivolous. The matters of which appellant complains are not the fault of respondent, nor of the trial court. If appellant was wronged at all (a matter which could not be determined on this record) his remedy is against his former attorney and not against respondent. If counsel desires to engage in a futile effort to make new law under such circumstances, he does so at his own risk and not at the expense of an innocent respondent. We think that counsel, and not respondent, should pay the expenses of such an action.
>
> "The judgment is affirmed. In addition to the usual costs on appeal, plaintiff's counsel shall pay, personally, to respondent, as a penalty for a frivolous appeal, the sum of $500.00, which sum we find to be a reasonable contribution by him toward respondent's expenses in defending the appeal."

The petition for rehearing was denied by the California Court of Appeal.

Petitioner thereafter petitioned the California Supreme Court for a hearing. By order made September 24, 1969, the California Supreme Court, without opinion, denied the petition for hearing.

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[1]This next to the last paragraph of the opinion as originally filed read as follows [Pet., Append. A, p. 13]:

"The appeal is patiently frivolous. If counsel desires to bring about a reversal of settled law, he should not do so at the expense of the respondent. We think that counsel, and not respondent, should pay the costs of what, at the best, is an unsuccessfully test lawsuit."

The next succeeding paragraph, imposing penalty for frivolous appeal, remained unchanged.

Jurisdiction.

Petitioner adequately sets forth that he claims jurisdiction of this Court to rest on 28 U.S.C. 1257 (3), and Rule 19, paragraph 1(a).

Questions Presented.

1. Where a penalty for taking of a frivolous appeal has been assessed by a state appellate court, not against petitioner but solely and personally against his appellate counsel, will certiorari issue at the instance of the petitioner who himself is not affected by such penalty assessment?

2. Will certiorari issue where petitioner did not raise or suggest any claim of violation of any constitutional provision at his first opportunity to do so, here in his petition for rehearing to the California Court of Appeal, and it does not appear that any constitutional question was either considered or determined by any state tribunal?

3. Assuming the foregoing be answered adversely to respondent, does the Due Process Clause of the Fourteenth Amendment to the United States Constitution proscribe (a) imposition by a state appellate court of penalty for taking of a frivolous appeal against appellant's counsel who is an officer of the state courts; and (b) the enforcement of the settled state appellate principle that a claim of inadequacy of an award for personal injury damages in a jury trial will not be considered on appeal in the absence of a motion for new trial presented on that ground to the trial court?

Statement.

The controlling facts are contained in the opinion rendered by the California Court of Appeal and its

order modifying its original opinion. [Pet., Appendix A and B.]

Petitioner was injured in an automobile accident. In a jury trial, he recovered a substantial award ($9,400 plus costs). He had engaged his trial counsel on a contingent fee basis. Additionally, he was injured in the course of his employment and had received the benefits of medical expenses and workmen's compensation from his employer's workmen's compensation carrier. Under California law, the compensation carrier was entitled to a lien upon the judgment for reimbursement of the benefits it had paid to or on behalf of petitioner. Under California Labor Code, section 3856(b), quoted in footnote 2 of the Petition, the trial court was required to order the payment from the judgment of his trial attorney's fees and the lien of the compensation carrier with the remainder going to the petitioner. This was done.

Apparently incensed at the deductions thus ordered, petitioner discharged his trial attorney and, through new counsel (his present counsel), appealed from the judgment. The sole claim advanced on the appeal was that the award of the jury was inadequate as a matter of law.

No motion for a new trial had been made.

By a long and unbroken series of decisions, the rule had been and is well settled in California that, in the absence of a motion for a new trial, the appellate court will not consider the claim on appeal that damages, awarded by a jury, were either inadequate or excessive. [Certified Record, Respondent's Brief, Point I. See also: *Jenkins v. Dahnert,* 1962, 202 Cal.App.2d 567, 21 Cal. Rptr. 15, appeal by plaintiffs *in propria persona* where

plaintiffs had been represented by counsel at trial and no new trial motion had been made; *Carter v. Agricultural Ins. Co.*, 1968, 266 Cal.App.2d 805, 72 Cal.Rptr. 462.] That petitioner's appellate counsel was aware of the rule is shown by the following statement contained in his Opening Brief filed in the California Court of Appeal: "Ordinarily, the question of inadequacy of damages will not be considered on appeal unless a motion for a new trial has been previously made on that ground by appellant (*Schmidt v. Macco Const. Co.*, 119 Cal.App.2d 717, 260 P.2d 230)." [Certified Record, Opening Brief, p. 10.]

Respondent, of course, could not have prevented petitioner from making such new trial motion. Petitioner states in his petition that "his trial counel made an unholy agreement with respondent's attorney that the judgment would not be attacked by motion for new trial, appeal, or otherwise, thus protecting trial counsel's contingent fee. (Certified Record, Motion to Dismiss Appeal, Exhibit B contained therein—page 1, l. 21; p. 2, l. 10)." The record reference made shows that petitioner's trial counsel and counsel for the workmen's compensation lien claimant "decided not to move for a new trial or to appeal the judgment, since we felt neither action was warranted" and that thereafter they informed respondent's counsel of their decision. Contrary to petitioner's assertion, respondent and his counsel were not guilty of making any "unholy agreement" with petitioner's trial counsel; and petitioner's iteration and reiteration of his assertion cannot and do not establish otherwise.

The California Court of Appeal found and determined [Petition, Appendix B]: "The matters of which ap-

pellant claims are not the fault of respondent"; "If appellant was wronged at all . . . his remedy is against his former attorney and not against respondent. If counsel desires to engage in a futile effort to make new law under such circumstances, he does so at his own risk and not at the expense of an innocent respondent."

Within the time required therefor, petitioner filed a petition for rehearing with the California Court of Appeal. Although he thus was presented with opportunity to assert his claims of violation of constitutional provisions, nowhere did he suggest the existence of any such violation. [Certified Record, Petition for Rehearing.]

Following denial of his petition for rehearing by the California Court of Appeal, petitioner filed a petition for hearing by the California Supreme Court. In that petition for the first time in the proceedings, petitioner made suggestion, by passing remarks, that violation of constitutional provisions had been made by the California Court of Appeal's decision.[2] As respondent's counsel read the petition for hearing, petitioner advanced the argument that a new trial motion should not be a prerequisite to consideration on appeal of the claim that an award based on jury verdict was inade-

[2]These passing remarks were [Certified Record, Petition for Hearing, pp. 8-9]: "It is therefore submitted that the Court of Appeal was in error in penalizing appellant's attorneys without a finding of bad faith; and that, in fact, it is an abrogation of petitioner's right to effective counsel, which is guaranteed to him by the due process clause of the Fourteenth Amendment to the United States Constitution, to impose such a penalty under the circumstances of this case. Furthermore, said penalty illegally fetters the discharge of petitioner's attorneys' duties to petitioner, and arbitrarily and capriciously invades the rights, privileges, and immunities granted to attorneys for the petitioner in their practice of law, all in violation of due process under Federal and California law."

quate but made no contention that such rule violated any constitutional provision. Petitioner, in his petition, belatedly claimed that the imposition of penalty for frivolous appeal on his counsel violated constitutional provisions.[3]

The California Supreme Court denied the petition for hearing without opinion. [Certified Record, Order of California Supreme Court denying Petition for Hearing.]

It does not appear that the California Court of Appeal ever was requested to pass upon any constitutional issues now sought to be presented by petitioner. The opinion of that court and the subsequent modification of its opinion on denial of petitioner's petition for rehearing contain no determination of any constitutional issue. It does not appear that the California Supreme Court considered or determined any constitutional issue belatedly advanced for the first time by petition for hearing to that court.

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[3]On page 6 of his petition for writ of certiorari, petitioner states: "It is therefore urged that it is a violation of due process to punish an appellant's attorney for being unsuccessful in his effort on appeal." In footnote 5 to this sentence, petitioner admits:

> "This constitutional issue was first raised in the Petition for Hearing in the California Supreme Court, since petitioner had no way of knowing in advance that the appeal would be deemed frivolous by the California Court of Appeal."

Petitioner through his appellate counsel was aware that the Court of Appeal deemed the appeal to be frivolous upon rendition of that court's opinion and its imposition of penalty. He thereafter petitioned the California Court of Appeal for rehearing but did not raise any such issue therein although he then had opportunity to do so. In fact, nowhere in his petition for rehearing did he suggest any constitutional violation to have occurred.

ARGUMENT.

I.

Petitioner Cannot Be Heard to Claim a Constitutional Infringement Occurred by That Which Does Not Affect Petitioner.

The penalty for frivolous appeal was not imposed on petitioner. The penalty was imposed on his counsel. Petitioner personally *in no way* has been affected thereby. A petitioner can complain only of that which affects him. He will not be heard to assert that some ruling or holding, which does not affect him, constituted an infringement of the Constitution. (See: *Virginian Ry. Co. v. System Federation No. 40,* 1937, 300 U.S. 515, 558, 57 S.Ct. 592, 81 L ed 789; *Hawkins v. Bleakly,* 1917, 243 U.S. 210, 218-219, 37 S.Ct. 255, 61 L ed 678.)

II.

Petitioner Cannot Be Heard to Claim That a Constitutional Infringement Occurred Where He Has Either Not Timely or Not Properly Advanced His Claim to State Tribunals.

In *Hershey v. Reclamation District,* 1927, 200 Cal. 550, 564, 254 P. 542, it was held: " 'It is the general rule applicable in civil cases that a constitutional question must be raised at the earliest opportunity or it will be considered as waived.' [Citation.]" This holding was quoted and followed in *Jenner v. City Council,* 1958, 164 Cal.App.2d 490, 498, 331 P.2d 176.

Petitioner here had reasonable opportunity to have raised any constitutional issue in his petition for rehearing to the California Court of Appeal. He did not do so. Not having done so, the foregoing rule applies.

He mentioned a constitutional issue for the first time in his subsequent petition for hearing to the California Supreme Court. Respondent's answer to that petition relied, among other things, upon the stated rule. [Certified Record, Answer to Petition for Hearing, p. 10.][4]

"A state procedural rule which forbids the raising of federal questions at late stages in the case, or by other than a prescribed method, has been recognized as a valid exercise of state power." (*Williams v. Georgia*, 1955, 349 U.S. 375, 382-383, 75 S.Ct. 814, 99 L ed 1161.) The suggestion of a federal right, made in a petition for transfer to the highest court of a state, concerning the judgment of an intermediate appellate court, is too late to serve as the basis for exercise of jurisdiction by the United States Supreme Court, where it does not affirmatively appear that the state's highest court passed upon any federal question but its denial of the petition may well have been on the ground that the question, not having been presented to the intermediate or lower court, was not timely or properly raised. (*Chicago, I. & L. R. Co. v. McGuire*, 1905, 196 U.S. 128, 131-133, 25 S.Ct. 200, 49 L ed 415. See also: *Central Union Telephone Co. v. Edwardsville*, 1925, 269 U.S. 190, 46 S.Ct. 90, 70 L ed 229; *Bailey v. Anderson*, 1945, 326 U.S. 203, 205-207, 66 S.Ct. 66,

[4]Respondent there pointed out: "Furthermore, ' "It is the general rule applicable in civil cases that a constitutional question must be raised at the earliest opportunity or it will be considered as waived" [Citation.]' (*Hershey v. Reclamation District*, 200 Cal. 550, 564, quoted and followed in *Jenner v. City Council*, 164 Cal.App.2d 490, 498, hearing denied by this Court.) Appellant's counsel had the opportunity to, but did not, raise any such constitutional argument in the petition for rehearing. This alone would preclude its consideration (*Jenner v. City Council, supra*, 164 Cal.App.2d at 498), were there any merit to it, which there is not."

90 L ed 3; *Parker v. Illinois,* 1948, 333 U.S. 571, 68 S.Ct. 708, 92 L ed 886; *Wolfe v. North Carolina,* 1960, 364 U.S. 177, 196-197, 80 S.Ct. 1483, 4 L ed 2d 1650; *Street v. New York,* 1969, 394 U.S. 576, 89 S.Ct. 1354, 22 L ed 2d 572).

III.

No Infringement of the Due Process Clause of the Fourteenth Amendment Here Has Occurred.

As respondent's counsel understand petitioner's petition, it is contended that the Due Process Clause of the Fourteenth Amendment has been violated by (a) the imposition of frivolous appeal penalty and (b) the application of California court's long established principle that a new trial motion is prerequisite to consideration on appeal of a claim that damages, awarded in a jury trial, are inadequate.

A. Imposition of Frivolous Appeal Penalty.

California courts long have had power to impose penalty for frivolous appeals in civil cases. (*Kincaid v. Johnson,* 1873, 47 Cal. 618.) California Rules of Court, Rule 26 (a), applicable to civil appeals, as amended effective January 1, 1959, provides in pertinent part: "Where the appeal is frivolous or taken solely for the purpose of delay . . ., the reviewwing court may impose upon offending attorneys or parties such penalties, including the withholding or imposing of costs, as the circumstances of the case and the discouragement of like conduct in the future may require."

Rule 56 (4), Rules of the Supreme Court of the United States, provides that this Court "may, in appropriate cases, adjudge to the respondent reason-

able damages for his delay." The power has been exercised. (See: *Wagner Elec. Mfg. Co. v. Lyndon*, 1923, 262 U.S. 226, 233, 43 S.Ct. 589, 67 L ed 961; *Slaker v. O'Connor*, 1929, 278 U.S. 188, 191, 9 S.Ct. 158, 73 L ed 258; *Roe v. Kansas*, 1929, 278 U.S. 191, 49 S.Ct. 160; 73 L ed 259; *Mississippi Central R. Co. v. Aultman*, 1935, 296 U.S. 537, 56 S.Ct. 108, 80 L ed 382; *Mississippi Central R. Co. v. Rife*, 1936, 299 U.S. 518, 57 S.Ct. 313, 81 L ed 382.)

It would appear that this is an appropriate case for the exercise of that power by this Court and respondent hereby so requests.

Petitioner's counsel advanced an appeal which as found by the California Court of Appeal: was "patently frivolous"; the matters complained of on appeal "were not the fault of respondent"; if petitioner was wronged at all, "his remedy is against his former attorney and not against respondent"; and, if his present counsel desired to engage in the "futile" appeal, under such circumstances, "he does so at his own risk and not at the expense of an innocent respondent."

The California Court of Appeal, having determined the foregoing facts, quite properly and correctly assessed frivolous appeal penalty against petitioner's counsel, an officer of the California courts, to discourage him from like conduct in the future.

Although California courts long have had power to impose penalty for frivolous appeals, that power sparingly has been exercised. It here was exercised in an appeal which was patently frivolous under circumstances warranting its award in favor of an innocent respondent.

This Court early held in *Whitney v. Cook*, 1879, 99 U.S. 607, 9 Otto 607, 25 L ed 446: "Our experience teaches that the only way to discourage frivolous appeals and writs of error is by the use of our power to award damages, and we think this is a proper case in which to say that hereafter more attention will be given to that subject, and the rule enforced both according to its letter and spirit."

In civil appeals, a state court has like reason and authority to assess frivolous appeal penalties to discourage the taking or advancement of frivolous appeals. That power does not violate any constitutional provision. Indeed, that power would appear to be an essential and probably inherent (see *Estate of King*, 1953, 121 Cal.App.2d 765, 774, 776-777, 264 P.2d 586)[5] one of appellate courts in civil appeals over appellants and their counsel who harass the courts and innocent respondents by taking of frivolous appeals.

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[5]On page 774, the California court stated (paragraphing omitted): "A court has inherent power by summary means to prevent an abuse of its processes and peremptorily dispose of causes of action and defenses that are sham, frivolous or wholly vexatious . . . '. . . The court is not powerless, for it has wide disciplinary powers over counsel and litigants who attempt to abuse its process.'" On pages 776-777, the California court stated: ". . . The court should not permit the appellate processes to be abused. See *Toohey v. Toohey*, 97 Cal.App.2d 84, 88 [217 P.2d 108], where Mr. Presiding Justice Peters pertinently states the rule applicable to the instant case: 'Not only has this frivolous appeal imposed a wholly unnecessary burden on respondent, but, by improperly consuming the time of a busy court, it has adversely affected the rights of other litigants properly before the court. This warrants the imposition of a penalty. [Citation.]'"

B. New Trial Motion as Prerequisite to Appellate Consideration of Claim That Jury Trial Award Was Inadequate.

As respondent's counsel read petitioner's petition for hearing to the California Supreme Court, petitioner did not in that petition (or at any time therefore) raise any questions as to the constitutionalty of the rule followed in California in civil cases that an appellate court will not consider a claim of excessive or inadequate damages, awarded in a jury trial, in the absence of a new trial motion on that ground.

As respondent's counsel read petitioner's petition to this Court, petitioner does not state that he ever attempted to raise any constitutional question in the foregoing regard either in the California Court of Appeal or by his petition for hearing to the California Supreme Court.[6]

Citation should be unnecessary to support the proposition that this Court will not consider an asserted constitutional question which was not raised properly and timely before the state tribunals. (See, e.g., *Cardinale v. Louisiana*, 1969, 394 U.S. 437, 89 S.Ct. 1162, 22 L ed 2d 398, and cases there cited.)

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[6]"If a review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record where the matter appears (e.g., ruling on exceptions, portions of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari." (United States Supreme Court Rules, Rule 23 (1)(f).)

Even so, were this obstacle not present, it does not appear that petitioner's claim may be sustained.

As heretofore noted, California courts long have followed the rule that, where an appellant claims that damages awarded in a jury trial were inadequate, the appellate court will not consider the claim where appellant made no motion to the trial court for a new trial on that ground. That salutary principle is followed in many, if not most, states. (4 C.J.S., Appeal & Error, section 388, pp. 1297-1301.)

There is nothing in the United States Constitution which purports to divest States of the power to adopt and follow the foregoing rule. Where a jury award has been made which the party feels is inadequate, it is but a reasonable and sensible rule to require that the matter first be passed upon at the trial court stage by new trial motion before appellant may raise the matter on appeal. That is a matter of State, not Federal, concern. If the party's counsel has wronged him in failing to make such prerequisite motion, his remedy is against his counsel, not against the innocent respondent.

In *John v. Paullin*, 1913, 231 U.S. 583, 585, 34 S.Ct. 178, 58 L ed 381, this Court held:

> "Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law. [Citations.]"

This was quoted and followed in *Wolfe v. North Carolina, supra,* 364 U.S. at page 195.

A state requirement, that review of constitutional issues would be considered only on an appeal taken directly to the highest court of the state and would be deemed waived by appeal taken to an intermediate appellate court of the state, was upheld in *Central Union Telephone Co. v. Edwardsville, supra,* 269 U.S. 190, confirmed in *Parker v. Illinois, supra,* 333 U.S. 571, 574-575.

Certainly, a requirement that a new trial motion be made, in order to raise a claim on appeal of inadequacy of damages awarded by a jury, cannot be held beyond the right or power of the various States.

Petitioner has not been deprived of any Federal Constitutional rights in the case at bench.

Conclusion.

For the foregoing reasons, it respectfully is submitted that the petition should be denied, with such damages, if ny, as to this Court may seem appropriate in the circumstances.

Dated: March 10, 1970.

Respectfully submitted,

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